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9 **STEPHON JAMES WHITNEY**

10 **UNITED STATES DISTRICT COURT**  
11 **FOR THE DISTRICT OF NEVADA**

12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 vs.

15 STEPHON JAMES WHITNEY,

16 Defendant.

CASE NO: 2:21-CR-002-JAD-NJK

**MEMO RE DEFENDANT'S WAIVER**  
**OF TEMPORARY RIGHT TO**  
**CUSTODY UNDER THE INTERSTATE**  
**AGREEMENT ON DETAINER'S ACT**

17 On January 22, 2021, during the Initial Appearance/Arraignment & Plea as to Stephon  
18 James Whitney before Magistrate Judge Cam Ferenbach, the Court asked for additional briefing as  
19 to Defendant's waiver of his right to temporary federal custody and invocation of his right to await  
20 federal prosecution in State custody. This memo follows.

21 A. THE INTERSTATE AGREEMENT ON DETAINER'S ACT DICTATES THAT  
22 MR. WHITNEY SHOULD BE RETURNED TO STATE CUSTODY.

23 The Interstate Agreement on Detainers Act (IADA) 18 U.S.C. App § 2. seeks to provide  
24 cooperative procedures between States and jurisdictions regarding persons already incarcerated in  
25 one jurisdiction with charges outstanding in another, where trial is to be had on an indictment,  
26 information or complaint.

1 The defendant has the right under the Interstate Agreement on Detainers Act (IADA), 18  
2 U.S.C. App. § 2 Art. IV(e), to remain in federal custody until final disposition of the charges  
3 against him/her, where it would otherwise be customary for the defendant to be returned to the  
4 sending state. This is because 18 U.S.C. App. § 2 Art. III(e) provides that “The request for final  
5 disposition shall also constitute a consent by the prisoner to the production of his body in any  
6 court where his presence may be required in order to effectuate the purposes of this agreement and  
7 a further consent voluntarily to be returned to the original place of imprisonment in accordance  
8 with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a  
9 concurrent sentence if otherwise permitted by law.” Further, 18 U.S.C. App. § 2 Art. V(e)  
10 provides that “At the earliest practicable time consonant with the purposes of this agreement, the  
11 prisoner shall be returned to the sending State.” 18 U.S.C. App. § 2 Art. V(h) goes on to state that  
12 “From the time that a party State receives custody of a prisoner pursuant to this agreement until  
13 such prisoner is returned to the territory and custody of the sending State, the State in which the  
14 one or more untried indictments, informations, or complaints are pending or in which trial is being  
15 had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for,  
16 keeping, and returning the prisoner.”  
17  
18  
19

20 Thus, it is the norm that the defendant would be sent back to the sending state, in this case  
21 to the Nevada Department of Corrections (NDOC). Whereas the defendant may assert the right to  
22 remain in federal custody until a final disposition can be had in this case, here Mr. Whitney is not  
23 asking to remain in federal custody. By executing a Waiver of Temporary Right to Custody under  
24 the Interstate Agreement on Detainer’s Act, he is not asking for special treatment.  
25

26 The Court is well within reason and discretion to order the United States Marshal to return  
27 the defendant to the jurisdiction with original custody, to-wit: NDOC, and to lodge a detainer  
28

1 against the defendant upon the defendant's return to the jurisdiction with original custody. As it  
 2 would also be within this Court's power to order the temporary detention of Mr. Whitney and to  
 3 provide leave to re-address and/or to re-open the detention hearing, upon Mr. Whitney's return to  
 4 Federal custody on the U.S. Marshal's detainer, because the State's relinquishment of custodial  
 5 control over Mr. Whitney would be a material change in circumstance.  
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 8 **B. BY VIRTUE OF THE GOVERNMENT'S PETITION FOR WRIT OF HABEAS**  
 9 **CORPUS AD PROSEQUENDUM, IT HAS ALREADY AGREED TO RETURN**  
 10 **THE DEFENDANT TO STATE CUSTODY.**

11 The Government's Petition states, "Accordingly, the Government requests a Writ of  
 12 Habeas Corpus Ad Prosequendum so that the United States Marshals Service can produce  
 13 STEPHON JAMES WHITNEY, before this Court for the purpose of initial appearance regarding  
 14 a Criminal Indictment and from time to time and day to day thereafter, at such times and places as  
 15 may be ordered and directed by this Court, to appear before this Court, and when excused by this  
 16 Court, to be returned to the custody of the Warden, Southern Desert Correction Center Las Vegas,  
 17 Nevada." Thus, absent extraordinary circumstances, the Government would have a very limited  
 18 basis to object to Mr. Whitney being returned to the sending jurisdiction, under the wording of its  
 19 own Petition and the IADA.  
 20

21 In regard to the function and effect of a Writ of Habeas Corpus Ad Prosequendum, the  
 22 court in U.S. v. Evans, 159 F.3d 908 (4th Cir. 1998), provides a reasoned analysis.

23 Writs of habeas corpus ad prosequendum are court orders demanding that an  
 24 inmate be produced to face criminal charges. *See Stewart v. Bailey*, 7 F.3d 384,  
 25 389 (4th Cir. 1993) ("[W]rits of habeas corpus ad prosequendum are issued  
 26 directly by a court of the jurisdiction where an indictment has been lodged  
 27 against the prisoner.... [A writ of habeas corpus ad prosequendum] is a court  
 28 order requesting the prisoner's appearance in the summoning jurisdiction.").  
 Such writs are "immediately executed," United States v. Mauro, 436 U.S. 340,  
 360 (1978), and, thus are unlike detainers which do not summon a prisoner to  
 the requesting jurisdiction's courts. *See Stewart*, 7 F.3d at 389.

1 That a writ of habeas corpus ad prosequendum does not effect a transfer of  
2 custody.... This derives from the fact that the federal writ of habeas corpus ad  
3 prosequendum merely loans the prisoner to federal authorities. *See Whalen*, 962  
4 F.2d at 361 n. 3; *Crawford v. Jackson*, 589 F.2d 693, 695 (D.C. Cir. 1978)  
5 ("When an accused is transferred pursuant to a writ of habeas corpus ad  
6 prosequendum he is considered to be 'on loan' to the federal authorities so that  
7 the sending state's jurisdiction over the accused continues uninterruptedly.  
8 Failure to release a prisoner does not alter that 'borrowed' status, transforming a  
9 state prisoner into a federal prisoner."). Principles of comity require that when  
10 the writ of habeas corpus ad prosequendum is satisfied, the receiving sovereign  
11 return the prisoner to the sending sovereign. As Chief Justice Taft explained in  
12 *Ponzi v. Fessenden*, 258 U.S. 254, 260 (1922):

9 The chief rule which preserves our two systems of courts from  
10 actual conflict of jurisdiction is that the court which first takes  
11 subject-matter of the litigation into its control, whether this be  
12 person or property, must be permitted to exhaust its remedy, to  
13 attain which it assumed control, before the other court shall  
14 attempt to take it for its purpose.

13 ... In each context, the sending jurisdiction has a significant interest in retaining  
14 custodial authority over the prisoner.

15 Id. 911-12.

16 Here not only does the State have a significant interest in retaining custodial authority over  
17 Mr. Whitney, he also has a significant interest in returning to State custody. He is due to appear  
18 before the parole board in February. If Mr. Whitney cannot be seen by the parole board, he may  
19 not be granted parole and will then have to wait before he can expire his sentence. Until he can  
20 expire his State sentence his time in custody counts little against his potential Federal sentence,  
21 even though his alleged conduct in the instant indictment was the basis for his State arrest and  
22 return to custody in the first place.

24 As such, Mr. Whitney is waiving his right to remain in federal custody pending a resolution  
25 in this case. The Court is well within reason and discretion to order the United States Marshal to  
26 return the defendant to the jurisdiction with original custody, to-wit: NDOC, and to lodge a  
27 detainer against the defendant upon the defendant's return to the jurisdiction with original custody.  
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1 Likewise it is within the Court's power to order the temporary detention of Mr. Whitney and to  
2 provide leave to re-address and/or to re-open the detention hearing, upon Mr. Whitney's return to  
3 Federal custody on the U.S. Marshal's detainer, because the State's relinquishment of custodial  
4 control over Mr. Whitney would be a material change in circumstance.  
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7 RESPECTFULLY SUBMITTED the 28<sup>th</sup> day of January, 2021.

8 */s/ Yi Lin Zheng*

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